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IN THE

Supreme Court of the United States

October Term, 1968

No. 1174

UNITED STEELWORKERS OF AMERICA, AFL-CIO, *Petitioner,*

v.

HAMILTON STEEL PRODUCTS, INC., NATHAN YORKE, and THE UNION CENTRAL LIFE INSURANCE COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-captioned case on December 19, 1968.

OPINIONS BELOW

The district court did not issue an opinion. Its order dismissing the complaint is reprinted in the Appendix herein. The opinion of the Court of Appeals affirming the dismissal of the complaint is reported at 404 F.2d 878 and is reprinted in the Appendix herein.

JURISDICTION

The judgment of the Court of Appeals was entered on December 19, 1968. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does a federal court have jurisdiction of a suit by a union against a bankrupt employer and the trustee in bankruptcy to enforce a collective bargaining agreement?

2. Where an employer has engaged an insurance company to hold and administer a fund which is to be distributed to employees who become entitled thereto under a collective bargaining agreement, does the federal court have jurisdiction of a suit by a union to compel the insurance company to distribute the fund in accordance with the terms of the collective bargaining agreement?

3. Where an insurance company has been engaged to hold and administer a fund which is to be distributed to employees who become entitled thereto under a collective bargaining agreement, is the distribution of the fund governed solely by the terms of the insurance contract between the employer and the insurance company, or is the collective bargaining agreement also relevant to that determination?

4. Where an employer and an insurance company contract for the latter to hold and administer a fund which is to be distributed to employees who become entitled thereto under a collective bargaining agreement, is enforcement of the insurance contract governed by Section 301 of the Labor Management Relations Act?

5. Does a private action to secure distribution of a fund maintained for the purpose of providing pension benefits to employees who become entitled thereto under a collective bargaining agreement conflict with the jurisdiction of the bankruptcy court over the bankrupt employer?

6. Does a federal court violate the supremacy clause of the Constitution of the United States when it dismisses an action brought under Section 301 of the LMRA on the ground that such lawsuit would interfere with an earlier filed diversity action seeking resolution of the dispute on the basis of state law?

STATUTES INVOLVED

Section 301(a) of the Labor-Management Relations Act, 1947, 29 U.S.C. § 185(a), 61 Stat. 156, provides as follows:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT OF THE CASE[1]

For many years, the employees of Hamilton Steel Products, Inc. (the Employer) were represented by United Steelworkers of America (the Union). In 1956, the Union and the Employer negotiated a pension agreement providing certain pension benefits for the employees, and requiring the Employer to establish and contribute to a fund from which pension benefits would be paid. Two days later, the Employer entered into an insurance contract with the Union Central Life Insurance Company (the Insurance Company) for the purpose of funding and administering the payment of benefits pursuant to the terms of the pension agreement (Vol. I, p. 15; Vol. III, p. 7).[2]

The insurance contract provided that the Employer would made an annual contribution to the Insurance Com-

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[1] Since the case was disposed of below by the granting of a motion to dismiss the complaint, our statement is based principally upon the allegations of the complaint.

[2] The record in the court below consisted of three volumes, the first two of which were incorporated from a prior case described herein. As used herein, "Vol. I" refers to "Appendix to Brief for Appellant" in No. 15,835 below; "Vol. II" refers to "Additional Appendix of Plaintiff, The Union Central Life Insurance Company" in No. 15,835 below; and "Vol. III" refers to "Appendix for Plaintiff Appellant" in No. 16,967 below.

pany, and that these contributions would be accumulated in a deposit fund (Vol. II, pp. 21, 23). It spelled out the bases upon which employees would become entitled to pension benefits and the amounts of such benefits, in language virtually identical to that contained in the pension agreement (Vol. II, pp. 16–19). It provided that the Employer would notify the Insurance Company when an employee became eligible for pension benefits (Vol. II, pp. 15, 20), and that upon receipt of such notification the Insurance Company would withdraw from the fund an amount sufficient to purchase an annuity providing the stipulated benefits for the employee (Vol. II, p. 23).

In subsequent years, the Union and the Employer entered into successive pension agreements continuing in effect the existing pension arrangements, and the Employer continued in effect its insurance contract with the Insurance Company to provide the benefits it promised in the pension agreement (Vol. I, pp. 15-16; Vol. II, pp. 2-10; Vol. III, pp. 6-7).

In 1964, the Employer became insolvent, petitioned for bankruptcy, and failed to make its annual contribution to the Insurance Company. On February 19, 1965, the Employer was adjudicated a bankrupt, and its assets were transferred to Nathan Yorke (the Trustee). (Vol. I, pp. 15-16; Vol. III, p. 8.) The bankruptcy proceeding is still pending.

The fund being held by the Insurance Company contains more than $150,000 (Vol. I, p. 17; Vol. III, p. 8). The Employer having ceased its contributions, the time has come to disburse the fund.

The Insurance Company acknowledges that it is a stakeholder and that it has no right to retain the fund (Vol. I, p. 23; Brief of Insurance Company to the court below, p. 1). A dispute has arisen, however, between the Union and the Trustee as to the proper disbursement of the fund. They are in agreement that a portion of the fund must be used to purchase annuities for certain specified employees, but they are in disagreement as to how the remainder of

the fund (more than $100,000) is to be disbursed (Vol. I, p. 61; Vol. III, pp. 9-10, 13.) The Union contends that the remainder must be disbursed in an appropriate fashion to the remainder of the bargaining unit employees; the Trustee contends that the remainder belongs to the Employer and, accordingly, that it should be paid over to the bankrupt's estate. (*Ibid.*).

This dispute has led to two rounds of litigation, the second of which is the subject of this petition for certiorari.

Round 1: The Interpleader Action

On September 2, 1965, the Insurance Company instituted an interpleader action in the federal district court in Chicago, seeking a judicial determination of how the fund is to be disbursed. (Vol. I, p. 13). It named, as defendants, the Employer, the Trustee, several employees (as representatives of the class of all employees), and certain representatives of the Union. The complaint recited the conflicting claims of the Trustee and the Union as to how the fund should be disbursed (Vol. I, pp. 20, 21), and prayed for a court order construing *the insurance contract* and directing distribution of the fund pursuant to *that contract* (Vol. I, pp. 23-24).

The defendant union representatives moved to have the Union itself substituted as a party defendant (Vol. I, pp. 106-07), explaining that the Union contends that *the pension agreement,* as well as the insurance contract, must be looked to in order to determine the proper distribution of the fund, and that the Union must be a party in order to enforce the pension agreement (Vol. I, pp. 106, 109-10). The court denied the motion (Vol. I, p. 110).

The Union then filed a separate motion to intervene (Vol. I, p. 111), alleging that distribution of the fund was dependent upon an interpretation of the pension agreement, that it wished to compel arbitration of its dispute with the Trustee over the meaning of the pension agreement pur-

suant to Section 301 of the LMRA, but that it could not secure such an order from the court unless and until it was made a party to the action (Vol. I, pp. 111-12). The court denied the Union's motion to intervene, stating that:

> "United Steelworkers of America, AFL-CIO, does not have a valid legal claim under and pursuant to Section 301 of the Labor-Management Relations Act, as amended, which would serve as a basis for intervention in these proceedings." (Vol. I, p. 113).

The Union appealed this ruling to the Court of Appeals for the Seventh Circuit, but the denial of intervention was affirmed, 374 F.2d 820 (7th Cir., 1967), the Court of Appeals stating:

> "[T]he present suit is a diversity action brought by Union Central for relief under the Declaratory Judgment and Interpleader Acts. It is not a suit by anyone for 'violation of contracts between an employer and a labor organization.' Therefore, Section 301(a) of the Labor Management Relations Act does not confer upon the Union the right to intervene in this proceeding. No case permitting a labor union to intervene as a right under Section 301(a) has been brought to our attention, nor has any been discovered during our research. In view of the plain strictures of Rule 24(a)(1) and Section 301(a), we must hold that the Union has no statutory right to intervene in the circumstances of this case. *In contrast, if this were a suit by the Union against a defaulting employer to enforce group rights created by a collective bargaining contract, the requirements of Section 301(a) would be met. . . .* Here the Union's attempted intervention simply does not fall within the terms of that Section, for the dispute does not arise out of a violation of a contract between an employer and a labor organization. Hence Section

301 does not support the Union's motion." (374 F.2d 820, 823; emphasis added.)

The interpleader action is still pending unresolved in the district court, awaiting resolution of the instant action.

Round 2: The Present Action

Having been denied intervention in the interpleader action, but having been told by the Court of Appeals that a suit initiated by the Union to enforce the pension agreement would be entertained, the Union instituted the present action in the same federal district court, naming as defendants the Employer, the Trustee, and the Insurance Company (Vol. III, p. 4). The complaint alleges that the federal court "has original jurisdiction pursuant to 28 U.S.C. Section 1337" and that the "suit arises under Section 301 of the [LMRA]." (Vol. III, p. 4). The Trustee in his answer does not dispute this jurisdictional allegation, contending only that the lawsuit might conflict with the jurisdiction of the bankruptcy court. (Vol. III, p. 12).

The complaint recites, and the Trustee in his answer admits, that the pension agreement required "establishment by the [employer] of a pension trust . . . to fund the [pensions]"; that the Employer entered into the insurance contract "pursuant to and in fulfillment of the aforesaid requirement that it fund the [pensions]; that the Insurance Company holds the fund merely as "a custodian"; that a dispute exists over the rights of the employees to benefits under *the pension agreement;* and that the pension agreement provides for arbitration of the dispute over its meaning. (Vol. III, pp. 7-10, 13).

As relief, the complaint seeks an order compelling the Employer and/or the Trustee to arbitrate with the Union the dispute over the meaning of the pension agreement, an order requiring the Employer and/or the Trustee "to direct the [Insurance Company] to expend and distribute

the proceeds of the Trust Fund to the Bargaining Unit Employees in accordance with their rights and interests under the Pension Agreement . . .," and an order requiring the Insurance Company "to comply with such direction" (Vol. III, p. 11). Additionally, the complaint seeks a declaration of the parties' rights under the insurance contract, and an order requiring the Insurance Company to disburse the fund to those entitled thereto (Vol. III, p. 10).

Unlike the Trustee, the Insurance Company filed no answer. Instead it filed a motion to dismiss on the ground that the denial of intervention to the Union in the interpleader action was res judicata and barred the institution of this new action (Vol. III, pp. 16-17).

The district court, without opinion, granted the motion and dismissed the complaint "as to all defendants," citing the Court of Appeals' decision in the interpleader action (Vol. III, p. 18).

The Court below affirmed. It reasoned as follows:

> "Section 301(a) of the Labor Management Relations Act provides federal jurisdiction of 'Suits for violation of contracts between an employer and a labor organization.' *Our analysis of the present complaint does not show that it is based on any violation of a contract between [the Employer] and the Union.* Instead, in this new lawsuit, the Union is seeking basically the same relief that Union Central is seeking in its interpleader action pending against [the Employer, the Trustee], and various representatives of the Union.
>
> ". . . We think it was within the discretion of the district court to refuse to entertain the Union's Section 301 suit at this late date,[3] for the issues can be properly

[3] The Court's reference to the Union's filing of the 301 action "at this late date" is somewhat mystifying. The Union sought promptly to intervene in the interpleader action, and when intervention was denied it promptly filed the instant action, as the court's opinion acknowledges (404 F.2d at 879). Moreover, no adjudication has yet been made by the district court in the interpleader action.

disposed of in the interpleader and bankruptcy proceedings. The new suit filed by the Union should not be permitted to oust the interpleader and bankruptcy courts of their prior jurisdiction." (404 F.2d 878, 879; emphasis added).

REASONS FOR GRANTING THE WRIT

This case presents a number of important questions concerning the protection of employees' collectively bargained pension and welfare rights. In a nutshell, the Union negotiated a pension agreement providing, *inter alia,* for the establishment of a fund from which pension benefits are to be paid. The time has now come to distribute that fund. The court below has held that the Union may not participate in the judicial proceedings which will determine how the fund is to be distributed and, further, that the terms of the pension agreement are irrelevant to the determination of the proper distribution of the fund. These rulings conflict with every other reported federal court decision in this area.

1. *Federal Court Jurisdiction over the Union's Quest for an Adjudication of Employees' Rights under the Pension Agreement*

The complaint in this action seeks, *inter alia,* a declaration of employees' rights under the pension agreement, an order compelling arbitration of the dispute which exists over the proper interpretation of the pension agreement, and an order requiring the Employer and the trustee in bankruptcy (who stands in the shoes of the bankrupt Employer[4]) to abide by the terms of the pension agreement. The pension agreement is a "contract between an employer and a labor

[4] See, e.g. *Christensen* v. *Felton,* 322 F.2d 323, 327 (9th Cir. 1963); *In re Woodruff,* 272 F.2d 696, 699 (7th Cir. 1959), cert. denied 362 U.S. 940 (1960); *In re Magnus Harmonica Corp.,* 262 F.2d 515, 517 (3rd Cir. 1959); 4 Collier on Bankruptcy 947-48.

organization" within the meaning of Section 301 of the LMRA, yet the court below has ruled that there is no federal jurisdiction over the Union's action. That decision conflicts not only with the literal language of Section 301, but also with an unbroken line of decisions by this Court holding that pension agreements and other collective bargaining agreements are enforceable in federal court. See, e.g., *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448 (1957); *Lewis* v. *Benedict Coal Corp.,* 361 U.S. 459, 470 (1960) (pension agreement); *John Wiley & Sons* v. *Livingston,* 376 U.S. 543, 552 (1964) (pension agreement).

The Union's suit to enforce the pension agreement is a run-of-the mill 301 action, and the decision below, holding that it is not, is plainly erroneous. Were it not for the other, more intriguing issues raised by other aspects of the complaint, we would urge this Court summarily to reverse the decision below.

2. Federal Court Jurisdiction over the Union's Quest for an Order Requiring the Insurance Company to Disburse the Fund in Accordance with Employees' Rights under the Pension Agreement

The more interesting jurisdictional issue arises from the Union's joinder of the Insurance Company as an additional party-defendant, and its request for an order requiring the Insurance Company to disburse the fund in accordance with employees' rights under the pension agreement. Does federal jurisdiction extend to this additional aspect of the complaint? The court below held that it does not. The Union contends that it does, for two separate reasons: (1) joinder of the Insurance Company is indispensable to providing appropriate enforcement of the pension agreement, because the fruits of that agreement—the monies which will actually pay the pension benefits—are in the hands of the Insurance Company (on this theory, it is irrelevant whether the separate contract of insurance is itself an agreement

enforceable under Section 301); and (2) the contract of insurance is an ancillary funding agreement negotiated for the purpose of implementing the pension agreement and is itself an agreement enforceable under Section 301.

If either of the Union's contentions is correct, the court below erred in dismissing the Union's action against the Insurance Company. And every other federal court which has faced the question has held, on one ground or the other, that federal jurisdiction extends to the union's claim against the third-party stakeholder. *Connecticut General Life Insurance Co.* v. *Craton,* 405 F.2d 41 (5th Cir., 1968)[5]; *United Automobile Workers* v. *Textron, Inc.,* and *The Union Central Life Insurance Company,* 312 F.2d 688 (6th Cir., 1963) and 359 F.2d 966 (6th Cir., 1966)[6]; *Abruscato* v. *Local 199, Industrial Workers* — F. Supp. —, 69 LRRM 2537 (S.D.N.Y., September 20, 1968),[7] *Bey* v. *Muldoon,*

[5] In *Connecticut General,* the Union sued to enforce both its collective bargaining agreement and the ancillary group insurance policy obtained by the employer from the insurance company. The Court held that it could entertain the Union's claims under the insurance policy "under the doctrine of pendent jurisdiction," 405 F.2d at 48. Accordingly it found it necessary to decide whether jurisdiction over the policy was also conferred by Section 301, noting only that "It may be that the scope of § 301 is sufficiently broad to include within its coverage the declaration of rights under insurance policies which arise out of the collective bargaining process," *Id.*

[6] In the second *Textron* decision, the Court of Appeals remanded with directions that the district court order that the fund (held by the same insurance company as is involved in the instant case) be disbursed in accordance with the terms of the pension agreement, 359 F.2d at 969.

[7] In *Abruscato,* the court sustained 301 jurisdiction over the trustees of the welfare and pension funds on the following reasoning:

> "It is clear that this complaint charges that there has been a violation of a contract 'between an employer and a labor organization representing employees in an industry affecting commerce,' i.e., the collective bargaining agreement of November 15, 1964. The fact that plaintiff's rights arise out of trust indenture creating funds for their benefit does not make their claim any the less a claim for violation of the collective bargaining agreement,

217 F. Supp. 404 (E.D. Pa. 1963)[8]; *Bath* v. *Pixler*, 283 F. Supp. 632 (D. Colo. 1968) (dictum).[9]

The question obviously is one of immense importance to the protection of employees' collectively bargained pension and welfare rights. "It is a commonplace of modern industrial relations for employers to provide security for employees and their families to enable them to meet problems arising from unemployment, illness, old age or death." *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459, 468 (1960). It has been our experience that all but the largest companies elect to administer these programs through a third-party "stakeholder." The right (or, more accurately, obligation, *Vaca* v. *Sipes*, 386 U.S. 171, 191 (1967)) of the Union to sue for enforcement of employee interests in such programs would be hollow indeed if the court's jurisdiction did not extend to the stakeholder who holds the money from which the benefits must be paid.

This Court should grant certiorari to resolve the conflict among the federal courts on this important jurisdictional question.

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[7] *(continued)*

for the collective bargaining in effect incorporates the trust indentures and makes a violation of the indentures a violation of the agreement." 69 LRRM at 2539.

[8] In *Bey*, the court sustained 301 jurisdiction over the "bank in which the funds are deposited," reasoning that: "If an employer is subject to suit certainly . . . those individuals administering the fund set up pursuant to the contract are logical parties to a suit which will of necessity interpret that contract. To exclude them would frustrate rather than serve the Congressional policy expressed in that section [301]." 217 F. Supp. at 406-07.

[9] "We are persuaded that the *Lincoln Mills* reasoning applied to Section 301 justifies acceptance of jurisdiction for the limited purpose of this suit, namely disposition of locked up funds following completion of the trust purposes." 283 F. Supp. at 635.

3. ***Federal Substantive Law: Is the Pension Agreement Relevant to the Determination of the Proper Distribution of the Fund Held by the Insurance Company? Is the Insurance Contract Enforceable under Section 301?***

Underpinning the jurisdictional questions are two of federal substantive law: (1) is the pension agreement relevant to the determination of the proper distribution of the fund held by the Insurance Company; and (2) is the insurance contract enforceable under Section 301? The court below affirmed dismissal of the complaint because, in its view, the rights of the parties as established in the pension agreement are irrelevant to the proper distribution of the fund held by the Insurance Company, and the insurance contract is not governed by Section 301.

The Insurance Company insists that its insurance contract with the Employer, and only that contract, is relevant in determining how the fund is to be distributed, and that the interpretation of that contract has nothing to do with Section 301:

> "The obligations of a life insurance company with respect to the payment of the proceeds under a contract of insurance issued by it are to be determined solely by the provisions of such contract properly interpreted.
>
> * * *
>
> "The case at bar involves no labor dispute but rather the legal interpretation of an insurance contract." (Brief of the Insurance Company to the court below, pp. 6-7, 8).

The court below agreed with the Insurance Company on both propositions. Its ruling conflicts with principles enunciated by this Court, as well as with decisions of two other courts of appeals. The questions are of vital importance in defining the reach of federal substantive labor law, established under Section 301, to the protection of collectively bargained pension and welfare plans.

We do not quarrel with the proposition that the typical contract of insurance is a commercial contract governed by standard contract law, and that the rights of third-party beneficiaries thereunder also are governed by standard contract law. We contend, however, that there is a specialized class of insurance contracts—those negotiated for the purpose of implementing collective bargaining agreements—which are governed by a different set of rules emanating from Section 301.

We are prepared to prove, in the instant case, that the Insurance Company entered into its contract of insurance with the Employer with full knowledge that its sole purpose was to implement the Employer's promises to the Union contained in the pension agreement, and that it was the intention of both the Employer and the Insurance Company to make the scope of coverage under the insurance contract coterminous with the scope of the promises made by the Employer in the pension agreement. If we are right, we insist that two legal consequences should follow:

1.) The determination of employees' entitlement to benefits should be made under the pension agreement—which provides for an arbitrator's resolution—and not under the ancillary insurance contract which merely echoes the pension agreement's terms but lacks an arbitration provision; and

2.) If the arbitrator sustains the employees' entitlement under the pension agreement, Section 301 requires that the identical interpretation be accorded the insurance contract, and empowers the court to direct the Insurance Company to disburse the fund in accordance with that interpretation.

While this Court has not considered or resolved these precise questions, it has given clear indication that traditional commercial concepts must yield to the federal labor policy implemented in Section 301. In *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 (1960), the Court rejected a contention that rights under collectively-bargained pension agree-

ments are governed by traditional "third-party beneficiary" concepts, stating:

> "Our problem is whether we should infer such an intention in this contract because there may be reasons making it appropriate to do so in the generality of third-party beneficiary contracts.
>
> "The collective bargaining agreement, however, is not a typical third-party beneficiary contract."
>
> * * *
>
> "Finally, a consideration which is not present in the case of other third-party beneficiary contracts is the impact of the national labor policy. . . . Thus the national labor policy becomes an important consideration in determining whether the same inferences which might be drawn as to other third-party agreements should be drawn here." 361 U.S. at 468, 470.

Benedict Coal, to be sure, did not involve the interests of a separate corporation (such as the Insurance Company here) which claims that it was not a party to the collective bargaining agreement. But this Court has bridged that gap as well, and has held that privity is not a prerequisite to the attachment of Section 301 responsibilities. In *John Wiley & Sons* v. *Livingston,* 376 U.S. 543 (1964), a new employer was held obligated to arbitrate disputes under his predecessor's collective bargaining agreement, even though he had not agreed to assume his predecessor's liability under that agreement. In rejecting the successor's defense based on non-assumption of the agreement, this Court said:

> "While the principles of law governing ordinary contracts would not bind to a contract an unconsenting successor to a contracting party, a collective bargaining agreement is not an ordinary contract. . . . Central to the peculiar status and function of a collective bargaining agreement is the fact, dictated both by circum-

> stance . . . and by the requirements of the National Labor Relations Act, that it is not in any real sense the simple product of a consensual relationship. Therefore, although the duty to arbitrate . . . must be founded on a contract, the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed. This case cannot readily be assimilated to the category of those in which there is no contract whatever, or none which is reasonably related to the party sought to be obligated. There was a contract, and Interscience, Wiley's predecessor, was party to it. We thus find Wiley's obligation to arbitrate this dispute in the Interscience contract construed in the context of a national labor policy." (376 U.S. at 550-51).

We believe the attachment of 301 responsibility here is even simpler than in *Wiley*. The Insurance Company undertook to earn a fee by serving as stakeholder of a fund which it knew was being accumulated to provide benefits promised in a collectively bargained pension agreement. It acknowledges that it has no right to the fund, and it has (or should have) no interest in how the fund is to be disbursed. In these circumstances, why shouldn't the fund be disbursed in accordance with an arbitrator's determination of rights *under the pension agreement,* rather than through a judicial construction of the insurance contract's language which was merely copied from the pension agreement? The Employer's promise to arbitrate such questions under the pension agreement will have been meaningless if the arbitrator's determination does not bind the Insurance Company to distribute the fund in accordance therewith.

The court below is alone in holding that the pension agreement is irrelevant to the determination of how the fund is to be distributed. The Courts of Appeals for the Fifth and Sixth Circuits both have reached the contrary result. In *United Automobile Workers* v. *Textron, Inc.*

and The Union Central Life Insurance Company, 312 F. 2d 688 (6th Cir., 1963) and 359 F. 2d 966 (6th Cir., 1966), the facts were substantially identical to the instant case. The union and employer were parties to a pension agreement, and pursuant thereto the employer engaged an insurance company (the same one involved here) as a stakeholder of the fund (312 F. 2d at 689). The plant closed down, and a dispute erupted between the union and the employer as to whether the latter could recapture a portion of the fund or whether it had to be disbursed to the employees. The Sixth Circuit construed *the pension agreement* as entitling the employees to the fund,[10] and it remanded with instructions that an order be entered requiring disbursement of the fund in accordance with that construction. 359 F. 2d at 969. Thus, the rights of the employees were determined *in a 301 action, under the terms of the pension agreement,* and disbursement of the fund in the hands of the insurance company was ordered pursuant thereto.

In *Connecticut General Life Insurance Co.* v. *Craton,* 405 F. 2d 41 (5th Cir., 1968), the union negotiated, with the employer, an agreement for the provision of insurance benefits and it "was understood by the parties that [the employer] would secure insurance in compliance with the terms of this . . . agreement." (405 F. 2d at 44). The employer did so. A dispute later arose as to the appropriateness of a particular deduction which the insurance company was making from insurance payments. The court first concluded that the deduction was not authorized by the *agreement between the union and the employer* (405 F. 2d at 46-68). It then turned to the question whether *the insurance company* could be forbidden to continue the deduction. It concluded that the deduction was not authorized by the insurance policy, relying principally on the concept

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[10] Apparently, the pension agreement did not provide for arbitration of disputes as to its meaning.

that the policy should be read *in pari materia* with the collective bargaining agreement:

> "In the strictest sense [the insurance company] was not a formal party to the terms of the . . . agreement between [the employer and the union], nor are the terms of the . . . clause in the policy identical with the terms set forth in the collective bargaining agreement. *Nevertheless, when the circumstances surrounding the issuance of the insurance policy are given their due weight, including [the employer's] obligation to adhere faithfully to its collective bargaining agreement, we think that the parties must have intended that the terms of the . . . clause in the insurance policy be read in pari materia with the terms of the . . . clause in the collective bargaining agreement.*" (405 F. 2d at 48; emphasis added).

The court went on to note that it "may be that the scope of § 301 is sufficiently broad to include within its coverage the declaration of rights under insurance policies *which arise out of the collective bargaining process*" (405 F. 2d at 48; emphasis added), but concluded that it was unnecessary to decide this question, as it had pendent jurisdiction to interpret the policy because "the claims made under the insurance contract and the collective bargaining agreement originated in a 'common nucleus of operative fact' ". (*Ibid.*)

The present case is important not only because of the conflict of legal reasoning with two other Courts of Appeals, but because the decision below threatens effectively to remove the arbitration process from the resolution of pension and welfare disputes. Of what value is arbitration under a pension agreement, unless the arbitrator's resolution governs the distribution of the pension monies so often in the hands of a third-party stakeholder? We seek a ruling that, where a stakeholder has knowingly contracted to implement the terms of a collective bargaining agreement, he is bound

to comply with an arbitral determination of the meaning of that agreement.

Our view of the importance of this question is shared by the Insurance Company, which advised the court below that our legal position, if accepted, "would have catastrophic effects upon the law of insurance and the insurance industry" (Brief of the Insurance Company to the court below, p. 9). We have no doubt that the ruling would affect the enforcement of tens of thousands of similar stakeholder agreements, although we cannot see how the ruling we seek would have a catastrophic impact upon stakeholders who, after all, are supposed to have no interest in how the funds they hold are distributed.

4. *The "Conflict" Between the Bankruptcy Proceeding and the 301 Action*

The court below stated, as an alternative basis for dismissing the complaint, that the 301 action might conflict with the jurisdiction of the bankruptcy court. This holding raises an important issue of federal substantive law—reconciliation of the respective roles of the Labor Act and the Bankruptcy Act—about which the federal courts are in conflict.

At the moment, the fund is not a part of the bankrupt's estate.[11] If the Union is correct in its contention that all of the fund must be disbursed to employees, it never will become part of the bankrupt's estate. If, however, the Trustee is correct that part of the fund should be returned to the Employer, it would then become part of the estate. The important question is who is to resolve that dispute—the bankruptcy court, or an arbitrator appointed under the terms of the pension agreement?

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[11] "The trustee takes no title to property not belonging to the bankrupt except as permitted by explicit provisions of the Act . . ." 4A Collier on Bankruptcy 84 (14th Ed. 1967).

The Court of Appeals for the Third Circuit has developed a formula for resolving such conflicts which, as applied to the facts of this case, would lead to a result opposite to that of the court below, *Koven & Brothers, Inc.* v. *United Steelworkers of America, AFL-CIO,* 381 F.2d 196 (3rd Cir., 1967):

> "[R]ecent Supreme Court decisions caution that the interpretation of a labor contract containing an arbitration clause is a matter involving considerations 'foreign to the competence of the courts', involving 'sources of law . . . not confined to the express provisions of the contract, as the industrial common law.' Our competence to render appropriate judgments on these contract matters is not enhanced because a bankruptcy matter is also involved. Therefore, if it is feasible to separate bankruptcy questions from contractual questions, the former should be decided by a court, and the proceedings stayed pending arbitral determination of the latter.
>
> * * *
>
> "In summary, we hold that questions involving an interpretation of the Bankruptcy Act should be decided by the Court, *while questions involving an interpretation of the collective bargaining agreement should if feasible be decided by the arbitrator,* unless they involve special bankruptcy interests. If such interests are present, then the proper forum should be dictated by the needs of the particular case, and this is a matter best left to the discretion of the trial court." 381 F.2d at 202, 205.

The court explained what it meant by "special bankruptcy interests" by comparing a claim against the general assets of the bankrupt (in which all creditors have an interest) to a claim against a fund in which the bargaining unit employees (but no other creditor of the bankrupt) have an in-

terest. The court stated that the former involves "bankruptcy interests" and would be subject to disposition under the Bankruptcy Act, while the latter clearly does not involve "bankruptcy interests" and therefore should be subject to resolution under the Labor Act. 381 F.2d 202-04. The court concluded that the case before it fell into the latter category, and directed that the dispute be arbitrated.

Applying the reasoning of *Koven,* the present case should be resolved under the Labor Act, not the Bankruptcy Act. The dispute is over distribution of a trust fund in which the employees, but no other creditors, have an interest. The decision below is in direct conflict with *Koven,* and the question is one of general importance which should be resolved by this Court.[12]

5. *The "Conflict" Between the Interpleader Action and the 301 Action*

The Court below gave, as a final reason for affirming dismissal of the complaint, that the 301 action "should not be permitted to oust the interpleader court[] of [its] prior jurisdiction." This holding is at least three-ways startling.

First, the Union does not seek dismissal of the interpleader action, and it does not claim that the 301 action should in any way "oust" the interpleader action. The Union would be delighted to have its 301 action consolidated with the interpleader action; indeed the separate 301 action would never have been instituted but for the earlier refusal to permit the Union to advance its 301 claims in the interpleader action.

Second, concepts of one court "ousting" another's jurisdiction seem rather irrelevant to this litigation. All three proceedings—bankruptcy, interpleader and 301—are pend-

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[12] We note, in passing, that the decision below proves too much. If the Union's 301 action conflicts with the bankruptcy court's jurisdiction, why does not the Insurance Company's interpleader action equally so conflict?

ing in the same district court. The interpleader and 301 actions were before the same district judge. We had thought that archaic pigeonholes were no longer in vogue under the federal rules. We do not understand how Judge Lynch can be in any danger of usurping jurisdiction from himself.

Finally, and most important, the reasoning of the court below has the rather extraordinary effect of reversing the Constitution's supremacy clause. The interpleader action is a diversity action seeking distribution of the fund under state law. In the 301 action, the Union is claiming that federal substantive law, i.e. Section 301, governs disposition of the fund. The court's dismissal of the federal claim on the ground that it would conflict with its implementation of state law in the interpleader action is, so far as we can tell, the first declaration of the supremacy of state over federal law since the ruling of the Maryland Court of Appeals reversed in *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819), and is perhaps the first such declaration ever by a federal court.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Appendix 1

IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

Name of Presiding Judge, HONORABLE WILLIAM J. LYNCH

Cause No. 67 C 1046—Dated April 11, 1968

Title of Cause

UNITED STEELWORKERS OF AMERICA, AFL-CIO

VS.

HAMILTON STEEL PRODUCTS, INC.

Order Motion of the defendant Union Central Life Insurance Company to dismiss the complaint is granted and the complaint is dismissed as to all defendants. See *Union Central Life Insurance Company* v. *Hamilton Steel Products,* 374 F. 2nd 820.

Appendix 2

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1968—SEPTEMBER SESSION, 1968

No. 16957

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Plaintiff-Appellant,

v.

HAMILTON STEEL PRODUCTS, INC., NATHAN YORKE AND THE UNION CENTRAL LIFE INSURANCE COMPANY,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

December 19, 1968

Before HASTINGS, KILEY, and CUMMINGS, *Circuit Judges.*

PER CURIAM. In a prior phase of this litigation, we held that Section 301(a) of the Labor Management Relations Act (29 U.S.C. § 185(a) did not confer upon the United Steelworkers of America ("Union") the right to intervene in a declaratory judgment and interpleader action brought by Union Central Life Insurance Company ("Union Central") with respect to an insurance policy issued to Hamilton Steel Products, Inc. ("Hamilton"). See 374 F. 2d 820. Shortly after the promulgation of that opinion, the Union filed its own suit, purportedly based on Section 301(a) of the Labor Management Relations Act and on the Federal Declaratory Judgment Act, seeking appropriate distribution of the pro-

ceeds of the policy which Hamilton had purchased from Union Central. The defendants in the new action were Hamilton, which had been adjudicated a bankrupt in 1965, Nathan Yorke, Hamilton's bankruptcy trustee to whom its assets had been transferred, and Union Central. These defendants were among the parties in the prior interpleader action filed by Union Central and not yet terminated.

The district court granted Union Central's motion to dismiss. We affirm.

Section 301(a) of the Labor Management Relations Act provides federal jurisdiction of "Suits for violation of contracts between an employer and a labor organization." Our analysis of the present complaint does not show that it is based on any violation of a contract between Hamilton and the Union. Instead, in this new lawsuit, the Union is seeking basically the same relief that Union Central is seeking in its interpleader action pending against Hamilton, Nathan Yorke, and various representatives of the Union.

The bankruptcy trustee has pointed out that jurisdiction of the Union's lawsuit might "conflict with the jurisdiction over your respondent [the bankruptcy trustee] and the assets of Hamilton Steel Products, Inc. ("Hamilton") vested in this court, sitting in bankruptcy in Case No. 64-B-1072." The trustee has also advised that in the interpleader action brought by Union Central, he is claiming certain of the funds held by Union Central under its insurance policy with Hamilton, on the ground that they are assets of the bankruptcy estate. We think it was within the discretion of the district court to refuse to entertain the Union's Section 301 suit at this late date, for the issues can be properly disposed of in the interpleader and bankruptcy proceedings. The new suit filed by the Union should not be permitted to oust the interpleader and bankruptcy courts of their prior jurisdiction. See *In re Muskegon Motor Specialties Co.*, 313 F. 2d 841 (6th Cir., 1963), certiorari denied, 375 U.S. 832.

The judgment is affirmed.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
Filed E.D

APR 10 1968

FRED J. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1174

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Petitioner,

vs.

HAMILTON STEEL PRODUCTS, INC., NATHAN YORKE, AND THE UNION CENTRAL LIFE INSURANCE COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE UNION CENTRAL LIFE INSURANCE COMPANY IN OPPOSITION.

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IN THE

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OPINIONS BELOW.

The opinion of the Court of Appeals affirming the dismissal of the Complaint is reported at 404 F. 2d 878 (Appendix 2 to Petition, p. 24).

The opinion of the Court of Appeals in the related case is reported at 374 F. 2d 820. This latter case is still pending and undecided in the District Court.

STATEMENT.

Shortly after Hamilton Steel Products, Inc. was declared a bankrupt, The Union Central Life Insurance Company ("Union Central") filed its Complaint for Declaratory Judgment and Interpleader under the provisions of the Declaratory Judgment Act, U. S. C. A. Title 28, § 2201 and Interpleader Act, U. S. C. A. Title 28, § 1335, to construe the terms of a Group Annuity Policy it had issued to Hamilton Steel Products, Inc., and otherwise to discharge its obligations with respect to same. It joined as defendants all interested parties, including Tom Webb, Mary Breach and Arthur Mayberry, as officers and agents of United Steelworkers of America, AFL-CIO Local Union 1092; Samuel E. Perish, as duly authorized representative and agent of United Steelworkers of America, AFL-CIO (the "Union"), and United Steelworkers of America, District 31, Subdistrict 5 (Vol. I, pp. 13-24). In answer to the Complaint, those defendants stated as follows (Vol. I, p. 31):

> "26. Defendants affirmatively allege that all of the funds on deposit with the plaintiff in connection with Policy No. GA-1061 are held for the sole and exclusive benefit of the employees of Hamilton Steel Products, Inc. (who are members of the Local 1092, United Steelworkers of America, AFL-CIO), and that they are the sole persons entitled to participate in any distribution of proceeds of such policy, *and that the only issue before the Court is the determination of relative and respective rights of such employees to such funds.*
>
> "WHEREFORE, such defendants as aforesaid, pray for the entry of an Order by the Court providing for:
>
> "(a) Payment of 'prior benefits' to the employees entitled thereto;
>
> "(b) Payment to the employees of the balance of the funds on deposit with the plaintiff in accordance

with their respective interests thereto; * * *" (Emphasis added.)

Thereafter, those representatives of the Union changed their position and through their attorneys filed a Motion to substitute the Union as a party defendant, in lieu of themselves (Vol. I, pp. 106, 107). That motion was denied (Vol. I, p. 110). Thereafter, the same attorneys filed a motion on behalf of the Union for leave to intervene as a party defendant (Vol. I, pp. 111-112). Intervention was denied, and the Union prosecuted its first appeal. The order of the District Court was affirmed in *Union Central Life Insurance Company* v. *Hamilton Steel Products, Inc.*, 374 F. 2d 820 (7th Cir., 1967). The Union did not petition this Court for a writ of certiorari following that judgment.

Subsequently, the Union filed a new Complaint (Vol. III, Appendix pp. 5-11) seeking, through compulsory arbitration under the grievance procedures of the Collective Bargaining Agreement (to which Union Central was not a party), the same relief sought in the District Court by the declaratory judgment and interpleader action brought by Union Central. The Union's Complaint was dismissed by the District Court, and the dismissal order was affirmed by the Court of Appeals for the 7th Circuit in the proceedings below.

The "Statement of the Case" contained in the Petition is incorrect in making the statement (at p. 7 of the Petition): "* * * having been told by the Court of Appeals that a suit initiated by the Union to enforce the pension agreement would be entertained, the Union instituted the present action * * *". No invitation to file the present action was extended by the Court of Appeals, the opinion of which had merely contrasted the circumstances of the pending case with a suit to enforce group rights under a collective bargaining agreement—the latter not being before the Court (374 F. 2d 820, 823).

ARGUMENT.

The Union does not belong in this Court. It failed to seek review by this Court after the Court of Appeals had entered a final judgment on the denial of the Union's petition to intervene in the declaratory judgment and interpleader action brought by Union Central. Instead of filing a petition for writ of certiorari in this Court, the Union sought a redetermination of the same matters decided in the first action, through the device of a new suit brought in its own name. The judgments of the District Court and the Court of Appeals respecting the second action understandably were the same as their judgments in the earlier determination, but the proper time (if any) for the Union to seek review of those judgments was after the determination made by the Court of Appeals upon the Union's first appeal (which was determinative of the Union's second appeal).

Furthermore, the Union waived any right to maintain its Section 301 suit when its representatives on January 4, 1966 filed an answer to the Complaint in the declaratory judgment and interpleader action, submitting to the jurisdiction of the Court in that action and asking the Court to distribute the funds on deposit with Union Central to the "employees * * * in accordance with their interests" (Vol. I, pp. 2, 30-31). As the Court of Appeals properly held on the Union's first appeal, the Union, by its participation in the trial court proceedings, waived any right to arbitration which it may have had (374 F. 2d 820, 824).

Even if the Union were not estopped, at this late date, to seek this Court's review of the judgments below, this Court should deny the petition for writ of certiorari for the reason that there are no "special and important reasons" for review of the judgment below (Rule 19(1) of

this Court). The judgment below does not bar the Union from asserting any argument on the merits it wants to assert in the District Court, through its representatives who are defendants in the pending declaratory judgment and interpleader suit (and who are represented by the Union's same attorneys). The judgment below merely held that the trial court did not abuse its discretion in refusing to entertain the Union's Section 301 suit, because the issues can be disposed of in the prior action pending in the same District Court. No one's substantive rights have been affected, because the issues have not yet been determined in the former action (the Union's two appeals having delayed the resolution of such issues).

There is no conflict between the judgment of the Court of Appeals in the case at bar and the judgment of the Court of Appeals of any other Circuit. The Union here attempts to create such a conflict (Petition, pp. 11, 16-18) between the judgment below and the judgment of the Court of Appeals for the Fifth Circuit in *Connecticut General Life Ins. Co.* v. *Craton,* 405 F. 2d 41 (1968), but the cases are completely consistent. In the *Craton* case there was no prior action pending when the local union and 214 of its members brought a declaratory judgment action against the employer and the group disability insurer for the interpretation of the collective bargaining agreement and the group policy. Unlike the case at bar, the plaintiffs in that case were not seeking arbitration of the meaning of the insurance contract. The Court in that case did not hold that the insurance company was subject to the Court's jurisdiction because of Section 301; rather, the Court expressly disclaimed any such holding, stating that the district court had jurisdiction over the insurance company under the doctrine of pendent jurisdiction (405 F. 2d 41, 48).

The Union also erroneously suggests (Petition, pp. 11,

16-18) a conflict between the decision below and those in *International Union* v. *Textron, Inc.*, 312 F. 2d 688 (6th Cir. 1963) and 359 F. 2d 966 (6th Cir. 1966). Those cases have no relevancy whatsoever and are apparently cited by Petitioner solely because one of the defendants was the group insurer under the pension plan in that case. No arbitration of the insurance policy was sought in those cases; no interpretation of the policy was even sought in court, and it does not appear that the insurance company had any objection to being named in the suits. The first suit was dismissed on the employer's motion, and there was no issue on the appeal as to the applicability of Section 301 to the defendant insurer. The second case involved only an interpretation of the collective bargaining agreement (on the question of whether the pension plan was terminated by the employer's notice to the Union that the collective bargaining agreement had been terminated). There was no issue as to the meaning of the insurance contract and no suggestion that the insurance contract could be subjected to arbitration.

All other cases cited by the Union are similarly distinguishable, failing to support the arguments for which the Union cites them. There is thus no sound reason under the Rules of this Court why this Court should grant the Petition.

Furthermore, the Court of Appeals was clearly correct in its opinions in the Union's two successive appeals, when it held that this matter does not involve a "violation of contract between an employer and a labor organization representing employees". Union Central was not a party to the collective bargaining agreement between the employer and the Union, nor was it a party to the pension plan adopted pursuant to the collective bargaining agreement. It may not be forced to abide by the decision of arbitrators, in the selection of which it would have no part, under an arbitration procedure to which it never agreed. Union

Central is a party to an insurance contract, for the interpretation of which it has asked the District Court's assistance. The Union, through agents who are parties to that proceeding, will have every protection to which it is entitled, in the action brought by Union Central. Instead, it has sought to oust the District Court of its prior jurisdiction to declare the rights of the parties in that action, by throwing the insurance policy into the hands of labor arbitrators. Such was never the intent of Section 301 which provides that "suits for violation of contracts between an employer and a labor organization * * * may be brought in any district court".

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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April, 1969.

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IN THE

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October Term, 1968

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Respondents.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

I

The Insurance Company contends that our petition is both too late (Brief in Op., p. 4) and too early (Brief in Op., p. 5). This paradoxical contention, which we demonstrate in Part II is unsound, is available only because of the unsettled state of the law governing this action, and reinforces the importance of prompt resolution of that law.

From the Insurance Company's standpoint, this is a traditional state-law insurance controversy; the interpleader action is the beginning and the end of the litigation which should resolve that controversy; and we either should have petitioned for certiorari from the denial of intervention in the interpleader action, or the union representatives who are parties to that action should appeal from the final decision therein. To the Insurance Company, our 301 action is an elephant trampling upon the verdant pasture of state insurance law, which should not divert the attention of this or any other court.

From our standpoint, on the other hand, Section 301 is what this litigation is all about. We tried to intervene in the interpleader action to advance our 301 claims, but we were denied admission. So we took the only other course available to us—one suggested in the Court of Appeals' decision denying intervention—and instituted our own Section 301 action.

To be sure, the result is a crazy quilt of parallel lawsuits actively competing with each other as to what law governs the resolution of this dispute. But that procedural incongruity is not a reason for denying certiorari. On the contrary, it is a reason for *granting* certiorari. Until this Court determines the governing substantive rules, it is inevitable that controversies of this type are going to get entangled in procedural quagmires, for in this area the procedural steps all are dictated by the party's view of the applicable law.

One additional example will illustrate the kinds of procedural problems which stem from confusion over the governing substantive rules. In the interpleader action, the district court (treating it as a state law action) has insisted that the employees must appear by private attorney if they wish to secure any portion of the fund, and that the union representatives may not advance the employees' claims. (Vol. I, pp. 58-60, 81, 87-95, 110). In the 301 action, however, the Union, as exclusive bargaining representative of the employees, is entitled to appear as the representative of employees' interests, indeed as the *sole* representative of those interests. *Acuff* v. *United Papermakers and Paperworkers,* 404 F.2d 169 (5th Cir., 1968); *Vaca* v. *Sipes,* 386 U.S. 171 (1967); *Humphrey* v. *Moore,* 375 U.S. 335 (1964). Two consequences turn on that distinction

1. If this controversy is governed by Section 301, employees' rights will be enforced without their having to pay any attorneys' fees or court costs. (These are benefits which the Union provides, as a matter of course, whenever it sues to enforce 301 rights. Its members have paid dues to ob-

tain the Union's representation; they are not asked to pay any more when the Union exercises those representational responsibilities). On the other hand, if this is a state-law dispute, in which the Union may not assert its exclusive authority, the result is likely to be imposition of attorneys' fees upon the individual employees. Indeed, that result has already been compelled in the interpleader action: the district court entered a "first partial interlocutory decree" providing certain employees who had procured the services of an attorney with benefits which were not disputed (Vol. I, pp. 48-52), despite a representation by the attorney that he would receive 10 per cent of the award (*Id.*, p. 44). The union representatives moved to vacate that decree on the ground, *inter alia*, that no attorney should receive a fee from the award for securing collectively bargained benefits (*Id.*, p. 58), and in the alternative they moved that the decree be amended to include other employees, similarly situated except that they had not retained an attorney (*Id.*, pp. 59-60). The Insurance Company and the above-mentioned attorney both opposed this motion, and urged that no other employees be awarded benefits until they too had secured a private attorney (*Id.*, pp. 81, 87-95). The court denied the union representatives' motion (*Id.*, p. 110), thus conditioning the right of other employees to secure their benefits upon their hiring an attorney to prosecute their claims.

2. It is quite likely that, at some point, a dispute is going to arise as to the proper allocation of the pension fund among the employees.[1] If this is a 301 action, the Union is entitled to advance, exclusively, its view of the proper allocation of the fund as between employees, taking into account its determination of the best interests of the group as a whole. *Acuff* v. *United Papermakers and Paperwork-*

[1] This will be particularly true if it is determined that the employer may not recapture any of the fund, and that this disputed portion must be distributed to the employees.

ers, 404 F.2d 169 (5th Cir., 1968); *Humphrey* v. *Moore*, 375 U.S. 335 (1964); *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953). If, however, this is a state-law action, the individual employees will be entitled to participate directly and engage in cut-throat competition, each to secure for himself the greatest share of the pie. The labor movement was born out of a desire to eliminate such competition among workingmen, and the National Labor Relations Act was enacted with that same objective. *J. I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944); *Acuff, supra; Humphrey, supra.*

II

We turn now to the specifics of the Insurance Company's claim that we are both too late and too early.

We are too late, the Insurance Company says, because we should have petitioned for certiorari from the Seventh Circuit's earlier decision denying the Union's motion to intervene in the interpleader action. We did not seek review of that decision for two reasons:

(a) The decision turned on the Seventh Circuit's notion that Section 301 does not give unions rights to intervene in lawsuits between other parties (374 F.2d at 822-23). Thus, the only issue upon which review could have been sought was the technical question of right to intervention. While we believed the Seventh Circuit's decision denying intervention was incorrect, we were not interested in seeking certiorari to review the law relating to intervention. Rather than delaying employees' receipt of pension benefits while the parties battled over the law of intervention, it seemed more expeditious, and more sensible, to initiate a separate 301 action.

(b) Our decision to go the latter route was strongly reinforced by the Seventh Circuit's comment: "In contrast, if this were a suit by the Union to enforce

> group rights created by a collective bargaining contract, the requirements of Section 301(a) would be met" (374 F.2d at 823). It seemed to us that the Seventh Circuit was telling us we had chosen the wrong course; i.e., that in its view Section 301 does not authorize intervention, but it does authorize a separate lawsuit. Indeed, we feared that if we petitioned for certiorari from the intervention decision the Insurance Company would argue that we had not pursued the alternative course which the Seventh Circuit had charted for us. Apparently, we were damned if we did, and damned if we didn't.

The earlier decision did not hold that the Union is without right to participate in *any* litigation over the distribution of the funds, and it did not hold that Section 301 and the pension agreement are irrelevant to that determination. Since these are precisely the issues we wish reviewed, and only the second decision decided them, this is obviously the proper time to petition for certiorari.

We are too early, the Insurance Company says, because "the judgment below does not bar the Union from asserting any argument on the merits it wants to assert in the District Court, through its representatives who are defendants in the pending declaratory judgment and interpleader suit (and who are represented by the Union's same attorneys)". (Brief in Op., p. 5). This contention is disingenuous.

The Insurance Company took the following position in the interpleader action:

> "It is submitted further that the mere appearance of certain representatives and agents of the union, in their representative capacities, does not give the union, or such representatives, a vicarious right derivative or otherwise, to represent persons who were formerly, or may be now, members of the union, and who have

vested property rights under the policy." (Vol. I, p. 81).

That position was accepted by the district court, which granted the Insurance Company's motion to strike the union representatives' motion to vacate or amend the "first partial interlocutory decree". In light of this success, surely it is disingenuous for the Insurance Company to tell *this* Court that the presence of the union representatives in the interpleader action adequately protects the interests which the Union seeks to advance by this 301 action.

> "A plaintiff who has obtained relief from an adversary by asserting and offering proof to support one position may not be heard later in the same court to contradict himself in an effort to establish against the same adversary a second claim inconsistent with his earlier contention. Such use of inconsistent positions would most flagrantly exemplify that playing 'fast and loose with the courts' which has been emphasized as an evil the courts should not tolerate . . . And this is more than an affront to judicial dignity. For intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice." *Scarano* v. *Central R. Co. of New Jersey,* 203 F.2d 510, 513 (3rd Cir., 1953).

In the interpleader action, the union representatives cannot speak even for those employees who want them to, let alone assert the Union's right to be *exclusive* representative of the employees in procuring the proper distribution of the fund. Nor is this likely to be the end of the union representatives' travail. The attorney for the individual employees has served notice that he will proceed against them, and their attorneys, for unauthorized practice of law if they attempt further to advance the interests of the employees in the interpleader action (Vol. I, pp. 92-93).

Moreover, wholly apart from these inhibitions on the

functioning of the union representatives, it is clear that they can play no meaningful role in the interpleader action in light of the decision below. The decision below rejects each of the substantive claims which the Union would wish to have advanced, and it is self-evident that that decision will be adopted and followed by the lower courts in the interpleader action. Thus, if this Court were to deny certiorari now, the question would return to this Court several years later, and if the Union's position is then upheld by this Court the parties would have to go back and start all over in the district court. The employees awaiting receipt of their pension benefits can ill afford the several years' delay which would result from that course.

III

The Insurance Company seeks to distinguish the decisions in *Connecticut General Life Insurance Co.* v. *Craton,* 405 F.2d 41 (5th Cir., 1968) and *International Union* v. *Textron, Inc.,* 312 F.2d 688 (6th Cir., 1963) and 359 F.2d 966 (6th Cir., 1966), on the ground that neither of those decisions ordered arbitration of the meaning of an insurance contract. (Brief in Op., pp 5-6). But *we* do not seek that relief either. We are seeking arbitration of the meaning of the *pension* agreement (the propriety of which is unquestionable), and a determination that Section 301 requires a *court* to construe the insurance contract *in pari materia* with the pension agreement.[2] It is the *latter* proposition which we contend was sustained in the cited cases.[3]

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[2] We noted in our petition that this doctrine would be applicable only where the insurance contract was drawn with an intention that its coverage be coterminous with the coverage of the pension agreement. The Insurance Company does not dispute our contention that this is such a case.

[3] The Insurance Company's contention that *Textron* did not decide this issue (Brief in Op., p. 6) is incorrect. In *Textron,* the court interpreted the pension agreement, and then directed that the fund held by the Insurance Company pursuant to the insurance contract be disbursed in accordance with that interpretation.

To be sure, if Section 301 means what we contend it means, the Insurance Company has an interest in the arbitration, for the arbitrator's determination of the meaning of the pension agreement would then be attributed to the insurance contract. Perhaps that interest would entitle the Insurance Company to participate in the arbitration, cf. *Transportation-Communication Employees Union* v. *Union Pacific Railroad Co.*, 385 U.S. 157 (1966); *Columbia Broadcasting System, Inc.* v. *American Recording and Broadcasting Association*, ——F. Supp.——, 69 LRRM 2914 (S.D.N.Y. Dec. 3, 1968), a participation which we would not oppose.

IV

The Insurance Company notes that in the opinion in the interpleader action the court below stated that the Union "by its attempt to intervene and participate before the District Court and by participating in Hamilton's bankruptcy proceedings . . . waived any contractual right to arbitration". 374 F.2d at 824. The court below relied on no such theory in its decision in the *instant* case. If it had, this would have been an additional "question presented" warranting certiorari. The Union's efforts to participate in the interpleader and bankruptcy actions are in no way inconsistent with its desire to arbitrate the meaning of the pension agreement. On the contrary, one of its principal purposes in seeking such participation has been to advance its claim for arbitration. The doctrine of waiver so casually announced is flatly inconsistent with the national labor policy favoring arbitration. Section 203(d) of the Labor Management Relations Act, 1947, 61 Stat. 154, 29 U.S.C. § 173(d); *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960).

The Insurance Company also advances a waiver theory of its own (Brief in Op., p. 4): that the union representa-